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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION TWO

LAURIE MARIE LASKEY,
Plaintiff and Appellant,

v.

FIDELITY INVESTMENTS,
Defendant and Respondent.

A123770

(Sonoma County
Super. Ct. No. SCV-242290)

Laurie Marie Laskey filed a complaint in propria persona for personal injury and identity theft against Fidelity Investments (Fidelity). Fidelity demurred to her complaint, and the lower court sustained the demurrer with leave to amend on the grounds that all of her claims were time-barred. Subsequently, Laskey filed a first amended complaint (FAC). The trial court found that Laskey's FAC did not cure the defect and sustained Fidelity's demurrer to the FAC without leave to amend. Laskey appeals. We conclude that the lower court properly sustained the demurrer without leave to amend.

BACKGROUND

On January 30, 2008, Laskey filed a complaint for personal injury and identity theft against Fidelity. She alleged causes of action for general negligence, intentional tort, products liability, and premises liability. She also alleged a cause of action for "computer crimes, identity theft, FCC violations[,] code violations, technical violations, split tunneling, security breach, invasion of privacy, stalking, etc." Laskey asserted that Fidelity "maintained a faulty system which [allowed] others access" to her information

and identity. She stated that she discovered in January 2003 when her employer “handed” her mail that Fidelity had improperly modified her name to her married name of Gavin on her 401K statement. She claimed that she never disclosed her married name and the use of Gavin indicated that there had been identity theft. Under her claim of an intentional tort, Laskey added that Fidelity caused her injury in January of 2003 because “[w]hen someone changes your information without authorization on your records it is an intentional act.”

On April 3, 2008, Fidelity filed a demurrer. Fidelity argued that Laskey’s claims were time-barred under Code of Civil Procedure section 335.1 as a matter of law. The trial court on August 7, 2008, sustained Fidelity’s demurrer against Laskey’s complaint with leave to amend.

Prior to the lower court’s ruling on Fidelity’s demurrer, Laskey filed her FAC on July 29, 2008. She set forth claims for general negligence, intentional tort, products liability, and premises liability. She also included a claim for “mass tort, breach of contract, etc.” She stated that Fidelity “was the cause” of her injury by using an unauthorized name change. She attached as an exhibit her statement from Fidelity for the year ending in 2002, which used her married name of Gavin.

Fidelity filed a demurrer to Laskey’s FAC on September 2, 2008. Fidelity maintained that the amended pleading was essentially the same as the original complaint; Fidelity again argued that all of Laskey’s claims were time-barred. Laskey did not file any opposition to the demurrer.

On November 14, 2008, the trial court sustained Fidelity’s demurrer without leave to amend. The court ruled that Laskey’s FAC failed “to address and/or cure the defects identified in the order granting the demurrer” to Laskey’s initial complaint.

Laskey filed a notice of appeal on December 29, 2008.

DISCUSSION

I. Jurisdiction

No judgment of dismissal has been entered in this matter and Laskey is appealing from the order sustaining the demurrer. “An order sustaining a demurrer without leave to amend is *not* an appealable order; only a judgment entered on such an order can be appealed.” (*I.J. Weinrot & Son, Inc. v. Jackson* (1985) 40 Cal.3d 327, 331, superseded by statute on another issue.) “The existence of an appealable judgment is a jurisdictional prerequisite to an appeal.” (*Jennings v. Marralle* (1994) 8 Cal.4th 121, 126.)

Ordinarily we would dismiss this appeal as being premature, but Fidelity requests that we deem the order sustaining the demurrer without leave to amend as incorporating the judgment of dismissal in order to prevent further delay. (See, e.g., *Hinman v. Department of Personnel Admin.* (1985) 167 Cal.App.3d 516, 520, superseded by statute on another issue [court has discretion to consider on the merits an appeal from an order sustaining a demurrer without leave to amend].) To avoid delay we deem the order sustaining the demurrer as incorporating the judgment of dismissal and decide Laskey’s appeal on its merits.

II. Standard of Review

The standard of review governing an appeal from the judgment after the trial court sustains a demurrer without leave to amend is well established. “ ‘We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.’ [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff. [Citation.]” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

Additionally, we note that Laskey is in propria persona, but a party appearing in propria persona “is to be treated like any other party and is entitled to the same, but no greater consideration than other litigants and attorneys.” (*Barton v. New United Motor Manufacturing, Inc.* (1996) 43 Cal.App.4th 1200, 1210.) “ ‘[T]he in propria persona litigant is held to the same restrictive rules of procedure as an attorney.’ ” (*Bianco v. California Highway Patrol* (1994) 24 Cal.App.4th 1113, 1125-1126; accord, *First American Title Co. v. Mirzaian* (2003) 108 Cal.App.4th 956, 958, fn. 1.)

III. Waiver

Fidelity asserts that Laskey has waived any argument that the lower court improperly sustained the demurrer without leave to amend because she failed to oppose the demurrer in the lower court. It relies on *Herzberg v. County of Plumas* (2005) 133 Cal.App.4th 1 when advancing this argument. *Herzberg*, however, is inapplicable. In *Herzberg*, the plaintiff in the trial court did not oppose the demurrer to a particular cause of action and also failed to mount any argument on this issue in the appellate court. (*Ibid.*) The appellate court therefore concluded that the plaintiff had abandoned the issue. (*Ibid.*) In contrast, here, although her argument is incomprehensible, Laskey in her appellate brief has not abandoned her challenge to the demurrer to her FAC.

There is, however, another basis for concluding that Laskey has abandoned any challenge to the lower court’s ruling. Laskey’s brief in this court violates the California Rules of Court, rule 8.204(a)(1) by not containing a statement of appealability, omitting a table of contents, failing to provide citations to the record, not including a statement of the action’s procedural history, and not containing a summary of significant facts limited to matters in the record. Laskey also has failed to provide any pertinent legal argument and has not explained the relevance of the various federal statutes that she does cite. (See, e.g., *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979 [“ ‘This court is not required to discuss or consider points which are not argued or which are not supported by citation to authorities or the record’ ”].) Failure to articulate any pertinent legal argument may be deemed a waiver or abandonment of the appeal. (See, e.g., *In re Sade C.* (1996) 13 Cal.4th 952, 994.) Although we could dismiss Laskey’s appeal for failing to set forth

in her briefs in this court any pertinent legal argument or citations to the record, we will consider the appeal on its merits.

IV. Statute of Limitations

All of Laskey's causes of action in her FAC were based on personal injuries that she allegedly suffered as a result of Fidelity's improper use of her married name of Gavin on her Fidelity 401K account statement, which she claimed was "an indication of identity theft." According to her original complaint, she discovered that Fidelity had used her married name when she received her mail from her employer in January 2003. She filed her original complaint five years later on January 30, 2008.

Statutes of limitations begin to run when a cause of action accrues. (Code Civ. Proc., § 312 ["Civil actions, without exception, can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued"]; *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397 (*Norgart*)). Generally speaking, a cause of action accrues at "the time when the cause of action is complete with all of its elements." (*Norgart, supra*, at p. 397.) Here, the injury occurred when Fidelity issued her 401K statement in January 2003 with Laskey's married name.

Laskey's claims appear to be based on a personal injury and therefore the two-year statute of limitations under Code of Civil Procedure section 335.1 apply.¹ "[T]he nature of a cause of action does not depend on the label the plaintiff gives it or the relief the plaintiff seeks but on the primary right involved." (*Bird, Marella, Boxer & Wolpert v. Superior Court* (2003) 106 Cal.App.4th 419, 427, fn. omitted.) The statute of limitations for property damage is three years. (Code Civ. Proc., § 338, subds. (b) & (c).) To the extent Laskey is alleging or could allege a breach of contract claim, the four-year statute of limitations under the Code of Civil Procedure section 337 applies. Additionally, any claim that is not for personal injury or property damage has a four-year statute of limitations under Code of Civil Procedure section 343.

¹ Code of Civil Procedure section 335.1 provides that the time for commencing an action is within two years for an injury to "an individual caused by the wrongful act or neglect of another."

In her original complaint, Laskey asserted that she knew about the injury in January 2003 and she therefore had until January 2007, under the longest statute of limitations of four years, to file her lawsuit. She did not file her original complaint until January 2008, and the lower court properly found that her claims were time-barred.

The trial court provided Laskey with an opportunity to remedy the defect that her claims were untimely. In her FAC, Laskey did not allege that she suffered any additional injury and her allegations were essentially the same as those in her original complaint. Her FAC, however, omitted the assertion contained in her original pleading that she learned of the alleged improper use of her married name in January 2003. She did attach as an exhibit to her FAC her Fidelity financial statement for the year ending in 2002, which contained her married name of Gavin. Facts appearing in exhibits attached to the complaint are also accepted as true. (*Barnett v. Fireman's Fund Ins. Co.* (2001) 90 Cal.App.4th 500, 505; *Holland v. Morse Diesel Internat., Inc.* (2001) 86 Cal.App.4th 1443, 1447.) Thus, the facts on the face of the exhibit attached to Laskey's FAC establish that the injury of using Laskey's married name occurred in the financial statement for the period ending in 2002.

Furthermore, to the extent that Laskey was attempting to avoid the defects of her prior complaint by omitting the date she learned that her financial statement from Fidelity contained her married name of Gavin, we take notice of her earlier pleading where she alleged that she received this document in January 2003. Generally, after an amended pleading has been filed, courts will disregard the original pleading. (*Kenworthy v. Brown* (1967) 248 Cal.App.2d 298, 302.) However, an exception to this rule occurs where an amended complaint attempts to avoid defects set forth in a prior complaint by ignoring them. (*Ibid.*) In such a situation, the court may examine the prior complaint to ascertain whether the amended complaint is merely a sham; the court may read into the amended complaint the allegations of the superseded complaint. (*Ibid.*; see also *Hills Trans. Co. v. Southwest Forest Industries, Inc.* (1968) 266 Cal.App.2d 702, 709-714.)

Since all of Laskey's claims in her FAC accrued in January 2003, they were untimely under the longest statute of limitations of four years. There is, however, an

exception to the general rule that the claim accrues at the time of injury. The discovery rule postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action. (*Norgart, supra*, 21 Cal.4th at p. 397.) A plaintiff has reason to discover a cause of action when he or she “has reason at least to suspect a factual basis for its elements.” (*Id.* at p. 398.) Under the discovery rule, suspicion of one or more of the elements of a cause of action, coupled with knowledge of any remaining elements, will generally trigger the statute of limitations period. (*Id.* at p. 398, fn. 3.)

In her original complaint, Laskey did raise some allegations related to the “discovery rule.” Although the claims statute does not apply to her pleading, next to the box on the pleading form related to being exempt from the claims statute, Laskey wrote the following: “Computer crimes that involves [*sic*] the theft of my identity based on product liability and premise liability and negligence. I just figured it out and have not been able to find anyone to help me. They are all afraid.” Laskey did not allege any facts to support the discovery rule in her FAC.

Even if we consider Laskey’s original complaint, none of the facts alleged were sufficient to establish the discovery rule applies. Laskey needed to plead the following facts to show the application of the discovery rule: “ ‘ “(1) the time and manner of discovery *and* (2) the inability to have made earlier discovery despite reasonable diligence.” [Citation.] In assessing the sufficiency of the allegations of delayed discovery, the court places the burden on the plaintiff to “show diligence”; “conclusory allegations will not withstand demurrer.” ’ ” (*Grisham v. Philip Morris U.S.A., Inc.* (2007) 40 Cal.4th 623, 638.) Laskey did not meet her burden as she never asserted that she discovered any injury after January 2003.

Further, in her brief in this court, Laskey does not provide any information about when she discovered the injury or any reason for failing to discover the injury earlier despite reasonable diligence. Rather, she simply states in her opening brief: “Plaintiff also suffers from delayed discovery realization. Defendant told plaintiff other facts to mislead plaintiff and prevent plaintiff from discovering the concealed or suppressed facts. Plaintiff was induced to further discovery. The doctrine of equitable tolling and estoppels

applies.” These conclusory statements are insufficient to show that the discovery rule applies.

In addition to the discovery rule, the doctrines of equitable tolling and equitable estoppel may toll the statute of limitations. In her opening brief in this court, Laskey makes a passing reference to both of these doctrines.

“[T]he three elements of equitable tolling are ‘(1) that defendant received timely notice in pursuing the first remedy, (2) there is a lack of prejudice to the Defendant in gathering evidence to defend against the second action, and (3) there is good faith and reasonable conduct by plaintiff in filing the second action.’ ” (*Thomas v. Gilliland* (2002) 95 Cal.App.4th 427, 434.) In her pleadings and in her briefs in this court, Laskey does not assert that she pursued an alternate remedy in good faith and therefore this doctrine is inapplicable.

“ “Four elements must ordinarily be proved to establish an equitable estoppel: (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had the right to believe that it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; and, (4) he must rely upon the conduct to his injury.” ’ ” (*Spray, Gould & Bowers v. Associated Internat. Ins. Co.* (1999) 71 Cal.App.4th 1260, 1268.) Other than allege in her opening brief in this court that equitable estoppel applies, Laskey alleges no facts that satisfy any of the elements of equitable estoppel. Indeed, she cannot allege such facts since she admitted that she was aware of the injury when she received her mail in January 2003.

We conclude that all of Laskey’s claims are time-barred as a matter of law and the lower court properly sustained Fidelity’s demurrer against her FAC.

V. Amending the Complaint

After giving Laskey an opportunity to amend her original complaint, the trial court sustained Fidelity’s demurrer against Laskey’s FAC when she failed to cure the defect in her original complaint. We conclude that the lower court did not abuse its discretion in

sustaining Fidelity's demurrer without leave to amend because there is no reasonable probability that the defects in the pleading can be cured by amendment.

As already discussed, Laskey cannot state a claim because the statute of limitations has run on all of her causes of action. In her brief in this court, Laskey seems to be arguing that she should be able to allege additional claims not set forth in her FAC. She mentions fraud and violations of the Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. § 1961(1); RICO) and the Computer Fraud Abuse Act (18 U.S.C. § 1030).² Even if she could set forth allegations to support these claims, they also are time-barred. A two-year statute of limitations applies to civil claims under the federal Computer Fraud Abuse Act. (18 U.S.C. § 1030(g).) The state fraud or mistake claims have a three-year statute of limitations. (Code Civ. Proc., § 338, subd. (d).) A civil federal RICO claim is subject to a four-year limitations period. (*Agency Holding Corp. v. Malley-Duff & Associates, Inc.* (1987) 483 U.S. 143, 156.) As already stressed, since Laskey knew of the facts constituting her claims by January 2003, even under the longest statute of limitations of four years, Laskey's claims expired in January 2007, a year before she filed her complaint against Fidelity.

² She also asserts that Fidelity violated the "Patriot Act" and "U.S. Codes." It is not clear what exact statutes she is claiming Fidelity violated. With regard to any alleged violation of the Patriot Act, section 802 of the USA Patriot Act of 2001 added a new definition of "domestic terrorism" under title 18 of the United States Code section 2331(5). However, there is no case law or any basis for supporting the existence of a private cause of action for a plaintiff's claim of treason. (*Cooksey v. McElroy* (S.D. Ohio Sept. 24, 2008, No. 1:07CV581) 2008 WL 4367593, *23.)

DISPOSITION

The judgment is affirmed. Fidelity is awarded costs.

Lambden, J.

We concur:

Kline, P.J.

Richman, J.